BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 22-CF-85

JOSHUA C. AUSTIN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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ISSUE PRESENTED

Whether the trial court properly admitted the later-unavailable victim's 911 call, in which she informed the operator of the attack she had suffered minutes earlier, where (A) the content and circumstances of the call reflect that it was a non-testimonial statement; (B) the call was admissible under both the excited-utterance and the present-sense-impression exceptions to the rule against hearsay; and (C) any error in admitting the call was harmless.

COUNTERSTATEMENT OF THE CASE

On May 21, 2021, appellant Austin was charged by superseding indictment with: (1) first-degree burglary of a senior citizen (D.C. Code §§ 22-801(a), -3601) (burglary); (2) kidnapping of a senior citizen (D.C. Code §§ 22-2001, -3601) (kidnapping); (3) robbery (of currency) from a senior citizen (D.C. Code §§ 22-2801, -3601) (robbery); and (4) assault with intent to commit the robbery of a senior citizen (D.C. Code §§ 22-401, -3601) (AWIR) (Record on Appeal (R.) A at 23; R.44). At a December 2021, trial before the Honorable Rainey R. Brandt, the jury convicted Austin of the burglary, robbery, and AWIR, and acquitted him of the kidnapping (R.A at 43; R.66; 12/15/21 Tr. 90-92).

On February 14, 2022, Austin was sentenced to concurrent 24-year terms of imprisonment for burglary and robbery, and five years of supervised release (R.71; 2/14/22 Tr. 27). Judge Brandt did not impose an AWIR sentence on grounds that it merged with the robbery conviction (2/14/22 Tr. 23). Austin noted a timely appeal (R.72).

The Trial

The Government's Evidence

As Austin acknowledges (at 2), on October 30, 2019, Emilie Marvil was robbed in the stairwell of her apartment building in the 5900 block of 13th Street,

N.W., after buying groceries at the nearby Missouri Market.

Esperanza Canales, Marvil's second-floor neighbor, testified that in 2019, the apartment building's front door and other doors were broken, and a key was unnecessary to enter the building (12/9/21 Tr. 92-96, 104; Government Exhibit (GE) 27).[1] There were security cameras near the front door, inside and outside the lobby (12/9/21 Tr. 96-97; GE8). Canales identified herself in video footage from an outdoor building camera walking alone to the front entrance of the building at 12:46 p.m. on October 30, 2019 (12/9/21 Tr. 98-99; GE11). In the video, she appeared to be holding a cell phone to her ear (GE11 at 12:46:31-12:46:33).[2]

When Canales entered the building, she "heard Emilie [Marvil] there asking for help" (12/9/21 Tr. 100). Although Canales did not "understand a whole lot of English," she understood that Marvil "was saying "[']help me, please, please[']" (*id.*). Canales found Marvil in the stairwell (*id.* 100, 106). Marvil was "spouting blood on her hands," and "all of [Marvil's] things were strung around on the ground," including a carton of eggs, and her purse (*id.* 100-01). Canales asked Marvil if she was okay, and if she wanted Canales to call an ambulance and the police, but

[1] Canales testified that there were also two doors in the basement that should require a key, but those doors were also broken in 2019 (12/9/21 Tr. 94-95, 104). In 2019, people would enter the building during cold weather and sleep in the stairwells, doorways, and the laundry room (*id.* 104).

[2] As explained infra at p. 9 n.10, the timestamp on the video was approximately five minutes fast (12/13/21 Tr. 152).

Marvil said, "[N]o, help me get up, please and take me to my apartment" (*id.* 100). Therefore, Canales "took [Marvil's] stuff up" and helped her to her apartment (*id.* 100, 107).

Canales had difficulty getting Marvil up the stairs; Marvil "was trembling a lot and she was crying a lot and she wasn't able to move her feet" as Canales helped her up the stairs (12/9/21 Tr. 101). Therefore, Canales called her son, who came to help her get Marvil up the stairs and then left for work (*id.* 101-02). Canales got Marvil to her apartment and then went to her own apartment (*id.* 102, 107).

Canales testified that when she was entering the front door, she did not see anyone leaving the building or in the lobby (12/9/21 Tr. 102). She saw only Marvil in the stairwell, and she did not hear any footsteps in the stairwell (*id.*).[3]

The parties stipulated that a 911 call (Government Exhibit (GE) 2) was made at 12:49 p.m. on October 30, 2019 (12/9/22 Tr. 40). The caller identified herself as Emilie Marvil and stated, inter alia, that she had just been attacked and that $60 had been stolen from her, as she was walking up the stairs in her apartment building (GE2). Marvil provided a description of her assailant which included that he was

[3] Canales testified that the stairwell where she found Marvil also led to the basement (12/9/21 Tr. 105). There were no cameras in the building's hallways or the stairwell where she found Marvil (*id.* 106).

black, tall, and thin, and she thought he was wearing a cap (GE2). Marvil stated that the man was riding a bike and had followed her into the building (GE2).

Metropolitan Police Department (MPD) Officer Norbert Dengler testified that around 12:45 p.m., he went to the apartment building in response to "a priority one call for service involving a robbery, force and violence" (12/9/21 Tr. 138-40). Officer Dengler explained that a "priority one" call meant going to the location using lights and sirens activated (*id.* 139). MPD Officer Tirik Davis also responded to the apartment building around 12:45 p.m. based on a report of a robbery (*id.* 108-10). The officers found the building's front door unlocked (*id.* 111, 141).

Marvil—a frail, thin, elderly, white woman who was about five feet tall—answered the door of her second-floor apartment unit (12/9/21 Tr. 114-16, 121, 142-43).[4] Marvil gave Officer Davis a description of her attacker, the details of which he did not recall (*id.* 121, 123-24, 143). After his recollection was refreshed with the radio-run lookout for the suspect, Officer Davis testified that Marvil described a black male in approximately his mid-20s, with a medium complexion and a thin build who was about 5' 6" or 5' 7", wore dark clothing, and possibly skull cap, and

[4] Marvil was born in 1951, and she died from a long-term illness in May 2021, at the age of 70 (12/13/21 Tr. 173-74).

rode a black bicycle without a kickstand (*id.* 131-32, 134-35).[5] After obtaining the description, Officer Dengler unsuccessfully canvassed the area in his patrol car based on what he recalled at trial as being a lookout for a black male with a thin build who was possibly on a black bicycle (12/9/21 Tr. 143-45).

Officer Davis testified that Marvil initially refused medical attention, but he noticed bruising on her arms and apparent blood stains on her clothing (12/9/21 Tr. 117-18). Emergency medical technician (EMT) Tekola Pettis responded to a call for medical attention (12/14/21 Tr. 12-14). Marvil, who was 68 years old, told Pettis that she had been assaulted in the hallway of her building, and she denied that she had lost consciousness or hit her head (*id.* 14-16). Pettis testified that Marvil had bruising and abrasions, which were most noticeable on her arms, but Marvil decided that she did not need to go to the hospital (*id.* 15-16).[6]

Inside Marvil's apartment, police recovered an empty green plastic change purse from a chair near the door, and from the floor next to the chair, a white plastic grocery bag that contained items (12/9/21 Tr. 50-53, 64-65, 67, 117-18; GE41;

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[5] Defense counsel opened the door to the government's admission of this description by questioning Officer Davis about the details of Marvil's description of her assailant in an attempt to show that Davis's lack of recollection constituted poor police work (12/9/21 Tr. 121-35). Although Austin speculates (at 23 n.10) that he might have pursued a different cross-examination if the 911 call had not been admitted, he does not challenge the admission of this evidence on appeal.

[6] Photos depicted Marvil's injuries, including multiple lacerations and dark bruises on both arms (12/9/21 Tr. 58-62; GE34-GE40).

GE45; GE106). From the bottom of the stairwell, on the basement level, police also recovered a small, full bottle of white wine with the seal intact (12/9/21 Tr. 52-53, 56-57, 67-68, 78, 151; GE31-GE32).

A forensic evidence analyst processed evidence in this case for latent fingerprints (12/13/21 Tr. 15-16, 18-19, 22-23). She found no latent prints on the green plastic change purse or on the wine bottle (*id.* 24, 26, 30-35, 55, 58; GE63). She found latent prints on the exterior of the white plastic grocery bag (12/13/21 Tr. 33-35, 38, 44-46; GE67; GE79-GE85). Three latent prints found on the white plastic grocery bag were identified as Austin's—from his right middle finger, left ring finger, and left palm (12/13/21 Tr. 22, 68, 73-74, 80, 91-92, 96-97, 99).

Joshua Austin's identity was later confirmed by his aunt, Renee Austin, through a photo identification procedure using a still shot of the suspect taken from the video footage at Marvil's apartment building (12/9/22 Tr. 44-58; 12/13/21 Tr. 194-97; GE54).[7] Also, MPD Detective John Pugh viewed body-worn-camera footage from an unrelated event on September 25, 2019, showing Austin in the same jacket with distinctive chest zippers that he wore in the October 30 video footage from Marvil's building (12/13/21 Tr. 175-76, 197-98; GE7; GE54). Renee Austin

[7] On December 18, 2019, Detective Pugh contacted Marvil to see if she could identify the suspect in a photo identification procedure, but Marvil said she would be unable to identify her assailant because she was attacked from behind and the person was on top of her (12/14/21 Tr. 11).

testified that Johsua Austin sometimes lived with her in the 1300 block of Kennedy Street, N.W., and while he lived there, he was unemployed and did not contribute money for household expenses (12/9/22 Tr. 44-46).

A representative of the company that managed Marvil's apartment building reviewed company records and found no information indicating that Joshua Austin had worked for the company, or particularly at that apartment building, on October 30, 2019 (12/13/21 Tr. 12-14).

Police obtained camera footage from the Missouri Market, which was located approximately 1.5 blocks from Marvil's apartment building (12/13/21 Tr. 101-02, 106, 138-43).[8] Detective Pugh reviewed the surveillance footage from the front entrance of the Missouri Market, which was played to the jury, and testified that it showed Marvil entering the market, and approximately five minutes later, showed Austin ride up to the market on a bicycle, lean the bicycle against the market's front window, and enter the market (*id.* 178-79; GE18 at 00:40-01:17, 06:00-06:33). Austin was wearing a black hat, a dark-colored jacket, camouflage pants, dark-colored shoes, and a backpack (12/13/21 Tr. 179).

Video footage from inside the Missouri Market showed Marvil enter the

[8] Police officers involved in obtaining the video footage from the Missouri Market found that the time stamp on the footage was inaccurate (12/13/21 Tr. 106, 109, 110, 134, 136, 139-43). The time on the surveillance footage was "behind" the real time by approximately three days, 15 hours, and 30 minutes (*id.* 142).

market carrying a reusable bag over her left shoulder, and then walk to the right side of the store (12/13/21 Tr. 180-81; GE19 at 01:05-01:46). Video footage from another angle inside the market showed Marvil shop for a carton of eggs and other items for several minutes, then go to the counter (12/13/21 Tr. 183-84; GE21 at 1:17-4:55). Within the subsequent two minutes, Austin entered the store just after two other men and stood near the counter and Marvil (12/13/21 Tr. 180-84; GE19 at 5:20-6:54; GE21 at 04:55-06:58).

Other footage from an angle behind the counter showed Marvil place a four pack of wine on the counter (12/13/21 Tr. 185; GE22 at 05:33-05:39). It showed Marvil place a green change purse on the counter and give the cashier something which the cashier put into the cash register; the cashier then took money from the cash register and handed it to Marvil, who put it into the green change purse (12/13/21 Tr. 186-87; GE22 at 06:38-07:38). Austin was within arm's reach of Marvil as she put away the money (12/13/21 Tr. 187). Thereafter, the cashier packed Marvil's items in a white plastic grocery bag and gave them to Marvil (*id.*; GE22 at 07:38-08:17).[9]

Video footage then showed Marvil move down the counter, transfer some of

[9] The Missouri Market's owner testified that the white plastic bags used to pack customers' items were always kept behind the counter and only she, her husband, and her brother had access to them (12/13/21 Tr. 129-32).

the items from the white plastic bag into her reusable bag, put the white plastic bag into the reusable bag, and leave the store (12/13/21 Tr. 182-83; GE19 at 08:12-10:52). Austin left the store approximately 20 seconds later (12/13/21 Tr. 183; GE19 at 10:52-11:12).

Exterior video footage of the market showed Marvil exit the store and stop outside the door (12/13/21 Tr. 187-88; GE20 at 10:49-10:54). Marvil arranged her bags and walking stick, and as she turned to walk off, Austin exited the market and walked directly behind her toward his bicycle (12/13/21 Tr. 180, 188; GE18 at 10:54-11:33; GE20 at 10:54-11:33).

Detective Ryan Savoy obtained security-camera footage from Marvil's apartment building on the day of the incident (12/13/21 Tr. 143, 146-52; GE11-GE15).[10] Video footage of the walkway leading to the front door showed Marvil leave the building, carrying a walking stick and a reusable grocery bag (12/13/21 Tr. 188-89; GE11 at 12:24:26-12:24:29). Around 19 minutes later, the same camera recorded Marvil returning up the front walkway toward her building, and, seconds later, recorded Austin riding up the walkway and getting off his bicycle (12/13/21 Tr. 189-90; GE11 at 12:43:00-12:43:30). Less than two minutes later, that camera

[10] Detective Savoy checked the accuracy of the timestamp on "the DVR monitor" pertaining to the footage and found "it was approximately five minutes faster than" real time (12/13/21 Tr. 152).

recorded Austin quickly get on his bicycle and ride away down the walkway (12/13/21 Tr. 190; GE11 at 12:44:48-12:44:54). In the interim, as the video footage showed, no one else entered or left that that entrance area (12/13/21 Tr. 190; GE11 at 12:43:30-12:44:48). Less than two minutes after that, the camera recorded Ms. Canales coming up the walkway to the building (12/13/21 Tr. 190; GE11 at 12:44:22-12:46:34). As the video footage showed, no one else entered or left that area between the time Austin left and Canales arrived (12/13/21 Tr. 190; GE11 at 12:44:54-12:46:22).

Video footage from inside the lobby of the apartment building showed Marvil approach and enter the front door (12/13/21 Tr. 191; GE12 at 12:43:12-12:43:33). As Marvil opened the front door, Austin rode up behind her on his bicycle and grabbed the door just as it was closing behind her (12/13/21 Tr. 191; GE12 at 12:43:24-12:43:31). Austin followed Marvil into the lobby, and as she crossed the lobby, climbed the lobby steps, and walked out of camera range, Austin stood at the side of the lobby, appearing to manipulate his cell phone (12/13/21 Tr. 191; GE12 at 12:43:32-12:43:54). Immediately thereafter, Austin crossed the lobby, went up the steps, and walked out of camera range in the same direction as Marvil (12/13/21 Tr. 191; GE12 at 12:43:55-12:44:04). Marvil looked back at Austin at least twice from the point when he grabbed the entrance door until she walked out of sight after climbing the lobby steps (GE12 at 12:43:27-12:43:52). Approximately nine seconds

passed between the time Marvil walked off screen and the time Austin walked off screen in the same direction (12/13/21 Tr. 191).[11]

No one else entered or left the lobby in the video footage thereafter (12/13/21 Tr. 191-92; GE12 at 12:44:03-12:44:25; GE13 at 12:44:26-12:44:43). Then, 40 seconds after Austin walked out of sight, he returned to the lobby from the same direction he had left it, hurried out the front door, and fled on his bicycle (12/13/21 Tr.193; GE14 at 12:44:44-12:44:55).[12] Thereafter, no one else entered or left the front of the building, but near the very end of the footage, Canales can be seen walking toward the building's entrance (12/13/21 Tr. 193-94; GE14 at 12:44:55-12:45:16; GE15 at 12:45:16-12:46:26).[13]

[11] The staircase where Marvil was attacked was approximately 15 feet from the short staircase in the front lobby (12/13/21 Tr. 138; GE115).

[12] The government explained in a hearing months before trial that it had learned that the surveillance footage from Marvil's apartment building was five minutes fast in comparison to real time (5/27/21 Tr. 12). Thus, contrary to the time stamp on the video footage, Austin left the building at approximately 12:39 p.m., Canales approached the front of the building around 12:41 p.m., and she entered the stairwell around 12:42 p.m. (*id.*).The government noted that Marvil called 911 at 12:49 p.m., and thus about seven minutes passed between the time Canales entered the stairwell and Marvil called 911 (*id.*).

[13] Austin chose not to present a defense case and not to seek a jury instruction on the defense theory of the case (12/14/21 Tr. 37, 57).

SUMMARY OF ARGUMENT

The trial court properly admitted Marvil's 911 call, which she made within minutes of being assaulted and robbed in the stairwell of her apartment building. The trial court correctly found that Marvil's statements in the 911 call were nontestimonial and thus their admission did not violate the Confrontation Clause despite Marvil's unavailability at trial. The trial court also properly admitted the 911 call under the excited-utterance and present-sense-impression exceptions to the rule against hearsay. Even if the trial court erred in making any of these rulings, the error was harmless under any standard of review.

ARGUMENT

The Trial Court Properly Admitted the 911 Call Into Evidence.

A. Additional Background

1. The 911 Call

The 911 call began with Marvil answering a series of questions by the operator about the location of her emergency, her name and phone number, and what her emergency was (GE2).[14] Responding to the operator's question about the nature of

[14] This discussion does not provide the full detail of Marvil's 911 call or describe the content of the call in order. A detailed, although not entirely complete, transcript of the 911 call is included in Austin's limited appendix.

her emergency, Marvil stated that she "was just attacked in [her] apartment building walking up the stairs," and that "he" had taken her money, thrown her down, and hit her in the arms which were "kinda bleeding now," and she "just wanted to report that" (*id.*). Answering further questions, Marvil indicated that the attack happened "about five minutes ago," she had never seen her attacker before, and she did not know whether he had any weapons (*id.*). When asked if her attacker was "still there," Marvil at first said, "No sir," and then continued by saying, "he got my, he dumped my package, my groceries, onto the floor and pulled me down the stair and found my money. He had a bike with him." (*Id.*). When asked about the color of the bike, Marvil said that it was black (*id.*). When the operator later asked, "He left on a black bike? Did you see what direction he went in?," Marvil responded, "No, I was in the stairwell. I only saw him coming in and because the door doesn't lock he just kept following me." (*Id.*)

The operator also asked for the attacker's description, to which Marvil responded, "He was black and tall and thin. I think he had a cap on. He was riding a bike. He came up behind me in my building. Our security door doesn't work." (GE2.) When asked, Marvil was unable to describe the man's shirt and pants (*id.*). When asked whether she needed medical treatment, Marvil responded, "I'm going to clean up the abrasions myself and the blood and I'll be fine" (*id.*). Later, unprompted, Marvil indicated that the man "got $60 with him," and when the

operator then asked if the man stole $60, Marvil responded, "Yes. That's what he got. He got really, really angry because I didn't have a wallet." (*Id.*)

2. The Government's Motion in Limine and Austin's Objections

On April 27, 2021, while Marvil was still alive, the government moved to admit her 911 call under the present-sense-impression exception to the rule against hearsay (R.39 at 3-4).[15] After Marvil died, the government argued that the 911 call also should be admitted as an excited utterance (R.47 at 4-5). Austin opposed admission of the call (R.41; R.48). He argued that Marvil's statements in the 911 call were testimonial, and their admission would violate the Confrontation Clause (R.41 at 2-5; R.48 at 1-5; 5/27/21 Tr. 14-15, 18-23). Austin acknowledged the government's argument that the call was admissible as a present sense impression, and he noted that the evidence should be evaluated "on a case-by-case standard," but he did not actually argue that the present-sense-impression exception did not apply (R.41 at 3-4). Austin did not respond at all to the government's argument that the call was admissible as an excited utterance. He just summarily argued at trial that it was "hearsay" (12/9/21 Tr. 41).

[15] The government also sought to admit portions of the 911 call as statements of identification (R.39 at 4) but later withdrew that argument (R.47 at 1).

3. The Trial Court's Ruling

Following argument by the parties, the trial court ruled that the 911 call was not testimonial (5/27/21 Tr. 32, 34). The court stated that the first time it listened to the call, it noted that Marvil was "soft-spoken, almost in a timid sort of way," it was very clear that she was having difficulty breathing, and she was making a "rambling stream of consciousness dump," most of which was not "directly in response to a question" (*id.* 26). The court found that Marvil's "emotion is, like, hanging on . . . by a thread," and she "is in shock" (*id.*). After listening to the call multiple times, the court heard Marvil "having to take small breaths as she continues to talk as if she's having a little bit of trouble catching some air" (*id.* 27).

Also, the court stated that it could "hear the emotion in [Marvil's] tone starting to . . . bubble up" when she mentioned her wallet, "as if she's trying to bite back her emotions" (5/27/21 Tr. 27). When Marvil said, "okey-dokey" near the end of the conversation, she also said, "I've got to go cry now," and the court found that Marvil's "voice is about to fracture at that point. The dam is going to burst. She doesn't want to cry." (*Id.*) The court found that Marvil had "been trying to hold back her emotions enough to have a conversation with this 911 person. She's being polite, but she is trying to suppress her tears and her cries." (*Id.*) The court noted that Marvil was "trying to hold herself together until she c[ould] break down and cry in private," which was understandable because she was from a generation that would do so (*id.*

28). The court found, however, based on Marvil's tone of voice, that "you can hear that she's distracted throughout the conversation" (*id.*). The court found that nothing about the 911 call "even remotely suggest[ed]" anything deliberate or reflective about Marvil's answers (*id.* 32).

Furthermore, the court found that the primary purpose of the 911 call was to meet an ongoing emergency (5/27/21 Tr. 33). The 911 operator was gathering information to get police officers to the emergency site and was trying to gather information so they would know what they were going to face (*id.* 30, 32, 33). The court cited, as an example, the 911 operator's first six questions, which asked about the location of the emergency, Marvil's name and phone number, and what her emergency was (*id.* 29-30).

The court noted that the 911 operator never asked Marvil if she was in a safe place (5/27/21 Tr. 30). Also, viewing the call from the 911 operator's perspective, the operator did not know based on Marvil's responses whether a weapon was involved, or whether the unknown assailant was still at large inside the building (*id.* 31, 33). Conversely, the operator knew that Marvil was bleeding, and that her assailant had become angry about Marvil's wallet (*id.* 32). Thus, the operator knew there was an injured person, and possibly an "angry mystery man," in the building (*id.* 32, 33). Marvil also told the 911 operator that the front door did not have a lock, and thus the court found that the scene was not secure, particularly because there

were no officers yet present (*id.* 33-34). The court concluded that, given the circumstances, it would be rational for the 911 operator to think there was an ongoing emergency (*id.* 31, 32).

The court further ruled that the 911 call fit the hearsay exceptions for excited utterances and present sense impressions (5/27/21 Tr. 34). The court recognized that to be an excited utterance, there must be a serious occurrence or startling event "which causes a state of nervous excitement or physical shock" (*id.* 34-35). The court found that the attack in the stairwell fit this factor (*id.* 35). Also, the court noted that although a person crying, or being agitated or "overly emotional," was commonly associated with an excited utterance, that hearsay exception pertained to the "presence of a serious state of nervous excitement or shock," and, the found, "[p]eople behave differently when they are in shock" (*id.* 29). The court indicated that requiring crying and "hysterics" was too narrow a way to interpret how people process traumatizing events (*id.* 35).

The court also found that the 911 call was made within a reasonably short time after the event (5/27/21 Tr. 35). Marvil was elderly, and had been attacked in a stairwell that was not near her apartment (*id.*). Marvil had to be helped up, finish climbing the stairs to her apartment, unlock the door, put down her groceries, and get to the phone (*id.*). The court found that the time which passed between the attack and the 911 call was a reasonable period in which to accomplish those things (*id.*).

Addressing the excited-utterance requirement that "the totality of the circumstances must suggest the spontaneity and sincerity of the statement," the court found that Marvil's "whole 911 call was a stream of consciousness dump of what happened that c[ame] across [as] very sincere" (5/27/21 Tr. 35-36). The court found that the call was made close enough to the attack that Marvil did not have time to reflect on it (*id.* 36).

Regarding the present-sense-impression exception, the court recognized that it applied to a "statement describing or made while the declarant was perceiving [an event] or immediately thereafter" (5/27/21 Tr. 36). Akin to the excited-utterance ruling, the court found that the time between the attack and the 911 call was explained by Marvil's age and needing to get to her apartment to make the call (*id.*).

B. The Trial Court Did Not Err in Finding That the 911 Call Was Nontestimonial.

1. Standard of Review and Legal Principles

Whether out-of-court statements are testimonial for Confrontation Clause purposes is a question of law that this Court reviews de novo. *Graure v. United States,* 18 A.3d 743, 756 n.16 (D.C. 2011).

In assessing a 911 call, the Supreme Court has held that:

> [s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the

> circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822 (2006). As the Supreme Court later explicated, "[t]he existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation." *Michigan v. Bryant,* 562 U.S. 344, 370 (2011). "[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* at 360.

"[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." *Bryant,* 562 U.S. at 363. "An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue." *Id.* The Supreme Court has indicated that the duration and scope of an emergency may depend, in part, on the type of weapon used. *Id.* at 364. Also, the victim's medical condition is "important to the primary

purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." *Id.* at 364-65. "The victims medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public." *Id.* at 365.

Nonetheless, "whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Bryant,* 562 U.S. at 366. Another factor is "informality in an encounter between a victim and police." *Id.* (emphasis omitted). The statements and actions of the declarant and interrogator, viewed objectively, also provide "evidence of the primary purpose of the interrogation." *Id.* at 367. "[T]he interrogator's identity, and the "content and tenor of his questions, can illuminate the primary purpose of the interrogation." *Id.* at 369 (cleaned up). In sum, a court "should look to all of the relevant circumstances," in assessing whether a declarant's statements are testimonial. *Id.*

2. Discussion

Based on the record here, there is no basis to overturn the trial court's ruling that the 911 call was nontestimonial. Viewed objectively from the position of reasonable persons at the time, Marvil was reporting an ongoing emergency. She

had been robbed in the common stairwell of her apartment building minutes earlier by a stranger who had followed her into the building. She was injured during the robbery, and she did not know her assailant's whereabouts or whether he was armed. Also, the operator's questions, and Marvil's answers, primarily reflect that they were to determine whether police assistance was needed to meet an ongoing emergency. *See Tyler v. United States,* 975 A.2d 848, 855-56 (D.C. 2009) (911 call nontestimonial where operator's questions and declarants' responses developed information about nature and location of incident, attacker's identity, and presence of injured victims, and primary purpose was to enable operator to send appropriate police and medical assistance); *see also Petit v. State,* 92 So.3d 906, 916 (Fla. Dist. Ct. App. 2012) (dispatcher's questions "to determine if an ongoing emergency even existed" did not produce testimonial statements).

Here, Marvil did not know her assailant's location when she called 911, which supports that the 911 call was nontestimonial. *See (Joseph) Smith v. United States,* 947 A.2d 1131, 1133-34 (D.C. 2008) (911 call nontestimonial where victim reported attacking husband had either run out of house or was still in basement). The 911 call does not substantiate Austin's suggestion (at 17, 20, 21) that Marvil knew her assailant had left on a bicycle. Although, when the operator asked if the attacker was "still there," Marvil at first said, "No sir," when he later asked, "He left on a black bike? Did you see what direction he went in?," Marvil responded, "No, I was in the

stairwell. I only saw him coming in . . . ." (GE2). Marvil's lack of knowledge about whether her attacker was still in the building indicated an ongoing emergency. *See Bryant,* 562 U.S. at 374 (fact that, during questioning, neither police nor victim knew shooter's location weighed in favor of finding an ongoing emergency); *(Joseph) Smith,* 947 A.2d at 1134 (same). Indeed, "to make the actual physical presence of the alleged wrongdoer a dominant factor in determining whether there is an ongoing emergency, narrows and distorts the guiding principle to be applied to a wide range of circumstances." *(Joseph) Smith,* 947 A.2d at 1134.

Also, contrary to Austin's claim (at 17, 20), the 911 operator did not learn that Austin was unarmed. When he asked Marvil whether her assailant had "any weapons," Marvil said she did not know (GE2). This lack of knowledge about whether the attacker was armed further supported an ongoing-emergency finding. *See (Joseph) Smith,* 947 A.2d at 1133 (911 call nontestimonial where, when asked, victim did not know if attacker had a weapon). In any event, even an unarmed attacker posed a danger to the public given what Marvil reported he had done to her.

Indeed, unlike the situation in *Andrade v. United States,* 106 A.3d 386, 391 (D.C. 2015), on which Austin relies heavily to claim that Marvil's statements were testimonial, this case does not involve a "private dispute," such as a domestic-violence incident, in which an attacker who has fled poses little likelihood of danger to the public. Instead, Marvil stated in the 911 call that five minutes earlier, she had

been followed into her apartment building by a stranger, who attacked her in a common stairwell, threw her down part of the staircase, hit her in the arms, which were now bleeding, stole money from her, and became very angry that she did not have a wallet (GE2). The risk of Austin committing this crime against other members of the public remained. Thus, there was strong reason to conclude that the 911 call was in response to an ongoing emergency. *Bryant,* 562 U.S. at 363-64 ("An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue."); *(Joseph) Smith,* 947 A.2d at 1134 (rejecting claim that emergency ended because there was no existing imminent threat to complainant).

Furthermore, the questions the 911 operator asked were of the type necessary to allow the police to assess the situation, the threat to the safety of the police, the victim, and the public, and whether the police might encounter a violent criminal upon arriving at the scene. *See Bryant,* 562 U.S. at 376 (finding such questions were of the type necessary to help police to meet ongoing emergency). The 911 call began with the operator asking about the location of Marvil's emergency, her phone number, and her name (GE2). The operator then questioned Marvil about the nature of her emergency, whether she knew her attacker, whether he had any weapons, whether the attacker was still there, and whether she saw where he went (*id.*). The

operator also asked questions pertaining to the attacker's description and whether Marvil needed medical treatment (*id.*).

Also, the informality of the 911 operator's questioning suggests that his primary purpose was to assess what he may have reasonably perceived as an ongoing emergency, and it "lacked any formality that would have alerted [Marvil] to or focused [her] on the possible future prosecutorial use of [her] statements." *Bryant,* 562 U.S. at 377.

Contrary to Austin's argument (at 18-19), the facts that Marvil stated in the 911 call that she was "just wanted to report" the incident, used the past tense, and said that she planned to care for her bloody injuries herself do not necessitate a finding that the call was testimonial. Marvil "just want[ing] to report" does not affect the Confrontation Clause analysis because her subjective or actual purpose in calling is not relevant in determining whether her statements were testimonial. *Bryant,* 562 U.S. at 360. That Marvil reported the incident in the past tense does not support that the 911 call was testimonial. *See, e.g., (Joseph) Smith,* 947 A.2d at 1133 (911 call in which victim reported that "she had just been physically attacked by her husband" was nontestimonial); *Long v. United States,* 940 A.2d 87, 90-91, 97 (D.C. 2007) (assault victim with facial wound who flagged down police car, said female had cut his face, and later pointed out assailant, made nontestimonial statements even though they "were not made as the crime occurred"). Indeed, 911 calls commonly report

attacks that have already happened, which does not remove them from the realm of nontestimonial statements. *See State v. Soliz,* 213 P.3d 520, 526 (N.M. Ct. App. 2009) (911 calls initiated by victims of violence "almost universally occur[ ] after the violent incident," yet circumstances of call at issue objectively indicated its primary purpose was to assist police in responding to ongoing emergency); *see also Collins v. State,* 873 N.E.2d 149, 152-55 (Ind. Ct. App. 2007) (although witness took at least the time needed to remove 60 marijuana plants from his garage before calling 911 to report murder, and reported past events, call details served to establish whether defendant posed present danger). Furthermore, it is not necessary that the victim seek, or accept an offer of, medical attention to find a 911 call nontestimonial. *See, e.g., Long,* 940 A.2d at 90, 97 (victim's statements to police were nontestimonial; victim refused to go to hospital, and sat in ambulance, which police officer had called, "for a few moments" before getting out). Regardless of whether Marvil wanted medical help, her statements gave the operator valid reason to believe that she was injured and bleeding when she called.

What is more, Austin's reliance on the notion that Marvil was in the tranquil, safe environment of her apartment when she called 911 (at 18-19) to claim that her statements were testimonial is unfounded. The colloquy between Marvil and the operator never established that. At most, it might be gleaned from the 911 call that Marvil was in her apartment by the fact that she asked if the police would come to

her door, but she also did not know where her attacker was and the security door to her building was not working. In any event, in finding a complainant's statements during a 911 call to be nontestimonial in *Davis*, the Supreme Court cited the fact that the complainant answered the operator's questions "in an environment that was not tranquil, or even (as far any reasonable 911 operator could make out) safe," to contrast the lower level of formality in that environment with the greater formality of the station-house interview of the complainant in *Crawford v. Washington,* 541 U.S. 36 (2004). *Davis,* 547 U.S. at 827. Thus, the tranquility and safety of the location from which Marvil called 911 is not evidence of the absence of an immediate threat. *See Soliz,* 213 P.3d at 528 ("As used in *Davis,* the phrase 'safe' and 'tranquil' environment do[es] not refer to the absence of an immediate threat but to an environment akin to formal police interrogation."); *see also Collins,* 873 N.E.2d at 155 (witness's statements in "very informal 911 call," in which he gave answers about ongoing emergency, were "not, for example, calmly relating past events in a relatively tranquil police station interrogation room").

What is more, the fact that Marvil did not sound panicked and hysterical in the 911 call does not undercut that there was an ongoing emergency and that she was still in the thralls of the attack she suffered minutes earlier. As discussed infra, her manner of speaking in the 911 call indicates that she was in shock when she made

it. For all of these reasons, the trial court correctly found Marvil's 911 call to be nontestimonial.

C. The Trial Court Did Err in Finding That the 911 Call Met Hearsay Exceptions.

1. Standard of Review

Generally, in addressing the admission of a 911 call as an excited utterance, this Court reviews the trial court's factual findings for clear error, and its conclusion that those facts permit the call's admission as an excited utterance for abuse of discretion. *Mayhand v. United States,* 127 A.3d 1198, 1205 (D.C. 2015). This Court generally reviews the trial court's admission of a 911 call as a present sense impression using the same standards. *Sims v. United States,* 213 A.3d 1260, 1266 (D.C. 2019).

Here, however, Austin did not challenge the admission of the 911 call as an excited utterance, or truly object to its admission as a present sense impression. See supra p. 14. Austin's general objection to the 911 call as "hearsay" was insufficient to preserve his current challenges to the 911 call as improperly admitted as an excited utterance and a present sense impression. *See Hunter v. United States,* 606 A.2d 139, 144 (D.C. 1992) (objections not made with "sufficient precision to indicate distinctly the party's thesis will normally be spurned on appeal"). At most, Austin's excited-

utterance and present-sense-impression arguments are subject to plain-error review. *Id.*[16] In any event, Austin's arguments fail under any standard of review.

2. The 911 Call Was Properly Admitted as an Excited Utterance.

"For a statement to qualify as an excited utterance, three elements must be met: (1) the presence of a serious occurrence which causes a state of nervous excitement or physical shock in the declarant, (2) a declaration made within a reasonably short period of time after the occurrence so as to assure that the declarant has not reflected upon his statement or premeditated or constructed it, and (3) the presence of circumstances, which in their totality suggest spontaneity and sincerity of the remark." *Melendez v. United States,* 26 A.3d 234, 245 (D.C. 2011). "Even if the victim's responses were to preliminary investigative questions, if they were made while the declarant is still under the spell of the startling event, the statements may qualify as excited utterances." *Id.* at 245-46 (internal quotation marks and citation omitted). "The decisive factor in determining the admissibility of excited utterances is that circumstances reasonably justify the conclusion that the remarks were not

[16] To establish plain error, Austin must show (1) error, (2) which is "plain" or "obvious," (3) "affects substantial rights," and (4) "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Olano,* 507 U.S. 725, 732, 734 (1993).

made under the impetus of reflection or premeditation." *Id.* at 246 (internal quotation marks and citation omitted).

Austin does not contest that the assault and robbery of Marvil was a serious occurrence which would cause in Marvil a state of nervous excitement or physical shock. Indeed, such an argument would lack merit. *See, e.g., (Raphael) Smith v. United States,* 666 A.2d 1216, 1222 (D.C. 1995) (armed robbery was serious occurrence). Nor does he contest that Marvil made the 911 call within a reasonably short period after the attack, and that argument would lack merit. *See, e.g., Parker v. United States,* 249 A.3d 388, 405 (D.C. 2021) (911 call made a little less than 15 minutes after assault was excited utterance); *(Raphael) Smith,* 666 A.2d at 1223 (911 call about 15 minutes after incident satisfied second factor of excited-utterance test).

Instead, Austin claims that the trial court erred in finding that the first and third elements of the excited-utterance test were met. Regarding the first element, he argues (at 28) that as in *Mayhand,* 127 A.3d at 1208, the trial court here abused its discretion by "effectively negat[ing]" that element of the test. In *Mayhand,* this Court noted the trial court's finding that the crime victim was possibly "masking" his emotional agitation, and held that controlling one's emotional state was "the type of deliberative cognitive function" that the first factor of the excited-utterance test was "supposed to screen out." *Id.* This Court held that by determining that a declarant may "mask" the symptoms required to justify the admission of his statement as an

excited utterance, the trial court "effectively negated the first element of the excited utterance test." *Id.* This Court found that "there was *no indication*" that the victim was "actually distraught, in shock, or in a state of nervous excitement" when he made his statements to the 911 operator. *Id.* (emphasis added).

Here, on the contrary, the trial court did not misconstrue the first element of the excited-utterance test by recognizing that Marvil's outward demeanor was insufficient to meet the first element, yet find that the element was met despite such a recognition. The trial court recognized the emotion in Marvil's voice, finding that although Marvil was "soft-spoken, almost in a timid sort of way," it was "very clear she's having difficulty breathing," Marvil's "emotion" was "hanging on by a . . . thread," and she was "in shock" (5/27/21 Tr. 26). The court noted that Marvil had to "take small breaths as she continue[d] to talk as if she[was] having a little bit of trouble catching some air" (*id.* 27). Also, the court found that most of what Marvil said was not "directly in response to a question," but instead was a "rambling stream of consciousness dump" (*id.* 26). Then, later in the call (during approximately the last 45 seconds), when Marvil mentioned her wallet, the court could "hear the emotion in her tone starting to . . . bubble up" and characterized it "as if she's trying to bite back her emotions" (*id.* 27). At the end of call, when Marvil said "okey-dokey," and that she had "to go cry now," the court found that the tone of Marvil's voice was "about to fracture. The dam is about to burst. She doesn't want to cry."

(*Id.*) The court found that Marvil was "*trying* to hold back her emotions enough" to speak with the 911 operator, and that she was "*trying* to hold herself together until she c[ould] break down and cry in private" (*id.* 27-28) (emphasis added).

Although Austin (at 29) asserts that the trial court's statements that Marvil was trying to hold herself together make this case akin to *Mayhand,* the key difference in the trial court's findings here was that Marvil was just "*trying*" to contain her emotion. As the court's findings showed, Marvil was unsuccessful in containing her emotion during the 911 call. *Mayhand* does not dictate a finding of deliberate masking by an elderly victim who is still so upset by being assaulted in her own building that she ended her call by going off to cry.

Nor does Austin demonstrate clear error in the trial court's assessment of Marvil's mental state, which considered the 911 recording and reached the conclusions discussed supra at pp. 15-18. Contrary to Austin's claim (at 31-32), the recording itself supports the trial court's findings about Marvil having trouble breathing and her voice reflecting emotion starting to bubble up as she talked about her wallet. Also, contrary to Austin's assertion (at 31), much of what Marvil said about the incident in the call was not responsive to the operator's questions and was indeed a "rambling stream of consciousness dump" (5/27/21 Tr. 26). For example, when the operator asked if the assailant was still there, Marvil said he was not, but

then gave a lengthy statement about what he had done and that he had a bike (GE2). Later, unprompted, Marvil talked about her assailant taking $60 (*id.*).

Austin's alternative rationalizations for Marvil's nonresponsive statements (at 31) in order to categorize them as direct and well-reasoned answers to the operator's questions do not render the trial court's findings clearly erroneous. The same is true regarding Austin's assertion (at 30-31) that Marvil paused between sentences in describing her assailant in order to ensure she gave accurate and detailed information, and that her statement that she "just wanted to report" the attack showed "self-awareness and reflection." *See Teasley v. United States,* 899 A.2d 124, 128-29 (D.C. 2006) (defendant citing parts of declarant's statements as allegedly showing deliberative thought was "an advocate's alternative view of the question," which did not demonstrate trial court error in admitting statements as excited utterances).

Furthermore, although this Court found in *Mayhand,* 127 A.3d at 1207, that the trial court's detection of "strain" in the 911 caller's voice was insufficient to meet the "much higher level of emotional upset" required to support the excited-utterance exception, precedent on the first element of the excited-utterance test focuses on whether there was present "a serious occurrence which cause[d] a state or nervous excitement *or* physical shock in the declarant." *Brown v. United States,* 27 A.3d 127, 131 (D.C. 2011) (emphasis in original). "[A] court need not find that the declarant was completely incapable of deliberative thought at the time he uttered the

declaration." *United States v. Joy,* 192 F.3d 761, 766 (7th Cir. 1999), *cited with approval in Teasley,* 899 A.2d at 129 n.5. Other courts have found declarants to have made excited utterances where they did not present a highly agitated demeanor, but were "in shock." For example, one court found that a 10-year-old declarant, who had seen her mother become trapped under a vehicle, was in shock when she described the incident in a police interview at least 30-40 minutes later, even though the officer did not recall her "being very upset and having difficulty talking to [him]," "other than naturally being upset about what had just happened." *Maggard v. Ford Motor Co.,* 320 F. App'x 367, 370, 375 (6th Cir. Apr. 7, 2009) (admitting statement as excited utterance).

Another court upheld as an excited utterance the statement of a 16-year-old rape victim, who escaped from a motel room, and reported the incident to a security guard at a nearby store, where the guard testified that the girl was scared, nervous, exhausted, and appeared "in shock." *Moore v. State,* 1994 WL 95363, at **1, 3 (Tex. App. Mar. 22, 1994). The court rejected the defendant's argument that the statement was not an excited utterance because the guard had testified that the girl was not crying and that "she wasn't real roused when she was hyped up." *Id.* at *3.

In yet another case, the court affirmed the admission as an excited utterance the statement of a 12-year-old who reported her sexual assault to a police officer after being released by her assailant. *State v. Hairston,* 79 N.E.3d 1193, 1195-96,

1200-01 (Ohio Ct. App. 2016). The court rejected the defendant's arguments that the declarant's statements were not excited utterances because the officer had described the declarant's emotional state, by testifying, "She seemed somewhat stunned. She had sort of a flat affect. She seemed timid. She seemed almost shellshocked." *Id.* at 1200-01. The court held that "[a] declarant's failure to react in a fashion completely dominated by hysteria and shock should not automatically render a statement inadmissible as an excited utterance." *Id.* at 1201 (citation omitted). The court found the declarant's "relative lack of outward emotion [wa]s not necessarily calm but rather shock," and "a statement made while in shock is an excited utterance." *Id.* (citations omitted); *see also State v. Beasley,* 100 N.E.3d 1028, 1042, 1064 (Ohio 2018) (statement of victim, who was bleeding from gunshot to elbow, and who was described by person to whom victim reported the incident as "pale and shaking, scared, and fidgety," properly admitted as excited utterance).

The trial court's personal assessment of Marvil's voice during the 911 call is entitled to deference from this Court. *See Pelzer v. United States,* 166 A.3d 956, 963 (D.C. 2017); *Gabramadhin v. United States,* 137 A.3d 178, 184 (D.C. 2016). This Court may find that although Marvil was not crying, yelling, or exhibiting hysteria during the call, she was indeed in shock, as the trial court found. *United States v. Alexander,* 331 F.3d 116, 124 (D.C. Cir. 2003) (refusing to disturb trial court's ruling that it was clear from 911 call that crime victim was upset in phone call even where

victim's voice remained monotone through call except when he became upset with 911 operator). The clear-error standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *see also Simmons v. United States,* 945 A.2d 1183, 1187 (D.C. 2008) (trial judge reasonably could find the three elements for an excited utterance had been met; "that the judge arguably could have evaluated the facts differently and found otherwise does not disentitle his decision to our deference on appeal"). This likewise holds true in applying plain-error review.

Austin's claim that the third element of the excited-utterance test was unmet also lacks merit. The 911 call itself, discussed supra, and the surrounding circumstances reflect the spontaneity and sincerity of Marvil's statements. As Canales entered the front door of the building, she heard Marvil pleading for help (12/9/21 Tr. 100). Canales found Marvil "spouting blood on her hands," with her purse and other items strewn around her on the floor (*id.* 100-01). In helping Marvil to her apartment, Canales had difficulty getting Marvil up the stairs; Marvil "was trembling a lot," "crying a lot," and "she wasn't able to move her feet" (*id.* 101). It took both Canales and her son to get Marvil up the stairs (*id.* 101-02). All of this evidence reflects Marvil's shocked, upset, and injured state in the minutes before she made the 911 call, and demonstrates the very slim likelihood that while

attempting to summon help as she lay on the stairwell floor, and while physically struggling to her apartment, Marvil was reflecting and deliberating on what to say to the 911 operator. *See, e.g., Parker,* 249 A.3d at 406 (declarant's fresh injuries weighed in favor of finding excited utterance). Even body-worn-camera footage when police officers arrived in response to the 911 call showed Marvil slowly opening her apartment door, wide-eyed and apparently fearful (GE102 at 2:25-2:51).

The fact that Marvil made the 911 call herself does not undercut that it was an excited utterance. This Court has upheld 911 calls as excited utterances in cases where the complainant made the call. *See, e.g., Goodwine v. United States,* 990 A.2d 965, 966-67 (D.C. 2010); *Teasley,* 899 A.2d at 126-27. Nor does the four-minute-and-39-second length of the call mean that it was not an excited utterance. The length of this call is not comparable to the 12- and 17-minute 911 calls this Court found were not excited utterances due in part to their length in *Gabramadhin,* 137 A.3d at 183-84, and *Mayhand,* 127 A.3d at 1201, 1211. That many of Marvil's statements were in response to the operator's questions did not show that they were not excited utterances. *Teasley,* 899 A.2d at 129 n.4.

3. The 911 Call Was Properly Admitted as a Present Sense Impression.

Under the hearsay exception for present sense impressions, this Court permits the admission of "statements describing or explaining events which the declarant is

observing at the time he or she makes the declaration or immediately thereafter." *Hallums v. United States,* 841 A.2d 1270, 1276 (D.C. 2004). The exception is based on the rationale that such statements "are considered reliable because the immediacy eliminates the concern for lack of memory and precludes time for intentional deception." *Id.* at 1277. This Court has indicated that the time interval between the observance and the statement should be short. *Id.* at 1278. "[T]he appropriate inquiry is whether sufficient time elapsed to have permitted reflective thought." 2 McCormick on Evidence § 271 (8th ed. July 2022 update).

Austin's argument (at 35) that the 911 call was not a present sense impression because it was not sufficiently immediate to the robbery lacks merit. Austin relies on *Goodwine,* 990 A.2d at 967, and *Gardner v. United States,* 898 A.2d 367, 374 (D.C. 2006), to assert that Marvil's 911 call—which he claims was made eight to 10 minutes after the robbery—was insufficiently contemporaneous. Although *Goodwine* and *Gardner,* respectively, held that statements made during, and a few seconds after, an event were present sense impressions, neither case addressed a temporal limit for applying that hearsay exception. Numerous other courts have found statements to fit the present-sense-impression exception well beyond those points and closer to the timing of the 911 call here. *See, e.g., United States v. Hawkins,* 59 F.3d 723, 730 (8th Cir. 1995) (upholding admission of call placed approximately seven minutes after underlying events) *vacated on other grounds,*

Hawkins v. United States, 516 U.S. 1168 (1996); *Miller v. Crown Amusements, Inc.,* 821 F. Supp. 703, 706-07 (S.D. Ga. 1993) (911 call made "in all likelihood less than 10 minutes after" accident was substantially contemporaneous); *United States v. Obayagbona,* 627 F. Supp. 329, 333-34, 339-40 (E.D.N.Y. 1985) (statement made by undercover agent 14 minutes and 25 seconds after defendant provided him with heroin sample fell within present-sense-impression exception); *State v. Odom,* 341 S.E.2d 332, 335-36 (N.C. 1986) (witness's description of abduction to officer who arrived on scene at least 10 minutes after abduction was present sense impression); *but see Hilyer v. Howat Concrete Co.,* 578 F.2d 422, n.7 (D.C. Cir. 1978) (finding it "doubtful" that witness's statement to officer made at least 15, and possibly up to 45, minutes after accident was present sense impression).

Also, Austin's claim (at 34-35) that the 911 call cannot have been a present sense impression because Marvil provided "deliberate and appropriate answers" to all the operator's questions and she paused "to check her recollection" lacks merit. Responses to questions can qualify as present sense impressions. *United States v. Boyce,* 742 F.3d 792, 797 (7th Cir. 2014) ("One can still make statements without calculated narration even if made in responses to questions"). Austin's self-serving characterization (at 34-35) of Marvil's pauses during the call as periods of reflection and his claim that rather than have Canales call 911, Marvil took time to "collect

herself mentally and physically" on her way to her apartment before calling 911 are speculative and are at odds with the trial evidence.

The evidence showed that there was some language barrier between Canales and Marvil, and that Marvil was trembling and crying and had physical difficulty getting up the stairs to go to her apartment (12/9/21 Tr. 100-02). Thus, it is far from clear that Marvil's negative response when Canales asked if Marvil wanted her to call an ambulance or the police can be properly viewed as purposefully and reflectively rebuffing her first opportunity to make a 911 call. Marvil's physical difficulty and emotional state while trying to get to her apartment undercut the notion that she was taking time to collect herself before calling 911.

In any event, those characterizations of Marvil's actions do not undermine the trial court's factual findings. *See Anderson*, 470 U.S. at 574 (factfinder's choice between two permissible views of the evidence cannot be clearly erroneous); *Teasley,* 899 A.2d at 128-29 ("advocate's alternative view" that some parts of complainant's statement showed deliberation does not undermine trial court's factual findings). The trial court found that the 911 call made very clear that Marvil was having trouble breathing (5/27/21 Tr. 26-27). The court found that Marvil was "in shock" (*id.* 26), and sounded "distracted throughout the conversation" (*id.* 28). The court also found that "nothing about this 911 call even remotely suggest[ed]" anything deliberate or reflective about Marvil's answers (*id.* 32). None of those

factual findings is clearly erroneous based on the evidence presented. Thus, the trial court did not abuse its discretion, or plainly err, in admitting the 911 call as a present sense impression.

D. Any Error in Admitting the 911 Call Was Harmless.

Where the admission of statements has violated the Confrontation Clause, reversal is required "unless the government can show beyond a reasonable doubt that the error was harmless because it did not contribute to the eventual verdict reached." *Lewis v. United States,* 938 A.2d 771, 776 (D.C. 2007). Thus, to find a constitutional error was harmless, this Court examines whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the errors[.]" *Id.* (quoting *Neder v. United States,* 527 U.S. 1, 18 (1999)).

Generally, if a 911 call has been improperly admitted as an excited utterance, such error is reviewed under the non-constitutional harmless-error standard. *See Odemns v. United States,* 901 A.2d 770, 781 (D.C. 2006); *see also Kotteakos v. United States,* 328 U.S. 750, 765 (1946) (error harmless where one can say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error"). Likewise, any error in admitting a 911 call as a present sense impression is generally

subject to *Kotteakos* harmless-error review. *Sims,* 213 A.3d at 1270, 1272.[17] However, because Austin did not preserve these hearsay-exception claims, he must show that the trial court's plain error affected his substantial rights, and "seriously affect[ed] the fairness, integrity, or public reputation of the judicial proceedings." *Olano,* 507 U.S. at 732, 734.

The trial court's admission of the 911 call caused no harm or prejudice under any standard of review. Although the government played and discussed the 911 call in its opening statement and closing argument, the call, in fact, added little to the government's case. Austin argues (at 24-25) that the 911 call provided the only evidence that a robbery occurred. Yet even apart from the 911 call, there was ample evidence from which the jury could infer the burglary, robbery, and assault. EMT Pettis testified that when she went to Marvil's apartment building on October 30, 2019, Marvil told Pettis that she had been assaulted in the building's hallway, and Pettis saw the bruising and abrasions on Marvil's arms (12/14/21 Tr. 12-16). Less than two minutes after Austin fled the building, Canales arrived there (12/13/21 Tr. 190; GE11 at 12:44:48-12:44:54, 12:46:34). Canales heard cries for help and found Marvil bleeding and upset in the stairwell with her purse and groceries strewn about

[17] Also, a "trial court's use of an improper ground for admission of evidence is harmless if the evidence was admissible for the same purpose on some other ground." *United States v. Winchenbach,* 197 F.3d 548, 557 (1st Cir. 1999).

her. See supra pp. 2-3. A photo taken in Marvil's apartment after the incident showed her green plastic change purse sitting empty on a chair (12/9/21 Tr. 118; GE106). As shown in video footage from the Missouri Market, that purse matched the small green purse in which Marvil placed her change from the cashier as Austin stood within arm's reach of Marvil (12/13/21 Tr. 186-87; GE22 at 06:38-07:38). Indeed, even without the content of the 911 call being admitted at trial, the fact that police officers responded to Marvil's apartment in response to a 911 call would have been admissible. All this evidence compelled the inference that Austin assaulted Marvil and stole the money from her change purse during the robbery.[18] Notably, Austin did not contest at trial that Marvil was attacked in the stairwell or that the charged crimes were committed (12/15/21 Tr. 51-54).

On the sole disputed issue of identification, the 911 call on its face did not prejudice the defense. Marvil did not name Austin, and her description of the assailant was cumulative of—and even less detailed than—Officer Davis's testimony about the description she gave him (compare GE2 with 12/9/21 Tr. 134-35). Officer Dengler's description of the lookout information on which he based his canvas of the area also provided descriptive information of the assailant and a bicycle (12/9/21 Tr. 143-45).

[18] Although the 911 call provided the only evidence that Austin took $60, the precise amount taken was not relevant to any issue at trial.

Moreover, the trial evidence as a whole provides compelling assurance that the jury would have convicted Austin even without the 911 call. The fact that Austin was at the Missouri Market at the same time as Marvil was uncontested, as was the fact that Austin was in Marvil's apartment building, entered right behind Marvil, and later exited through the same front door (12/9/21 Tr. 37; 12/15/21 Tr. 53, 61). Austin's only defense was that someone else committed the assault and robbery. Even without the 911 call, there was overwhelming evidence that Austin was the perpetrator.

To start, three of Austin's prints were found on the exterior of the white plastic grocery bag in which the cashier packed Marvil's groceries at the Missouri Market. See supra pp. 6, 8. As the market's owner testified, Austin did not work there, and those bags were kept behind the counter where only she and two family members had access to them (12/13/21 Tr. 130-32). Neither the video footage from the market nor from Marvil's apartment building showed Austin touch the white grocery bag. Thus, the most reasonable inference from the evidence is that he left his prints on the bag as he assaulted and robbed Marvil in the stairwell.

The video footage was also highly incriminating. It showed Austin standing next to Marvil as she received change from the Missouri Market cashier and placed it in her green change purse. See supra pp. 8, 42. Video footage further showed Austin exit the market shortly after Marvil and stand at his nearby bicycle as Marvil

arranged her bags before walking away. See supra p. 9. Austin then left with his bicycle, and was shown in video footage minutes later, riding up behind Marvil and catching the front door of her building as it was closing behind her. See supra pp. 9-10; GE18 at 11:33-12:36. Then, Austin stood at the side of the lobby as Marvil slowly made her way through the lobby and out of camera range. See supra p. 10. Nine seconds later, Austin crossed the lobby and walked out of camera range in the same place Marvil had. See supra pp. 10-11. The stairwell where Marvil was robbed was just 15 feet from where Marvil and Austin disappeared from camera range (12/13/21 Tr. 138; GE115). Austin returned to the lobby 40 seconds later from the same point he left it, hurried out the front door, and took off on his bicycle. See supra pp. 10-11.

Just a few minutes later, Canales entered the building, heard cries for help, and found Marvil bleeding in the stairwell with her purse and groceries strewn about her. See supra pp. 2-3, 10-11, 41. A photo taken in Marvil's apartment after the incident showed her green plastic change purse sitting empty on a chair (12/9/21 Tr. 118; GE106). All this evidence compelled the inference that Austin assaulted Marvil and stole the money from her change purse during the robbery. Thus, the admission of the 911 call, if erroneous, was harmless under any standard.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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District of Columbia
Court of Appeals

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Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

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A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
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(d) the year of the individual's birth;
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B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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Signature

22-CF-085
Case Number

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing Brief for Appellee to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Cecily E. Baskir, Esq., on this 18th day of September, 2023.

_____/s/_____
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